SUPREME COURT, U. S.

FILED

MAR 11 1969

JOHN F. DAVIS, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

No. 1145

THOMAS F. GORDON,

*Petitioner,*

v.

THE BROOKLYN BAR ASSOCIATION,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

MORTON LIFTIN
1819 H Street, N. W.
Washington, D. C. 20006
*Attorney for Petitioner*

Washington, D. C. - YHIEL PRESS - 202 - 393-0625

## TABLE OF CONTENTS

Opinion below ..... 1
Jurisdiction ..... 2
Questions presented ..... 2
Constitutional provisions involved ..... 3
Statement of case ..... 3
Reasons for granting the writ ..... 7
Conclusion ..... 18

## TABLE OF CASES

*Boyd v. United States*, 116 U.S. 616 ..... 10, 11, 12, 14
*Bradley v. Fisher*, 13 Wall. 355 ..... 18
*Cohen v. Hurley*, 366 U.S. 117 ..... 8, 9, 12
*Cummings v. Missouri*, 4 Wall. 277 ..... 12
*De Gregory v. New Hampshire Att'y Gen.*, 383 U.S. 825 ..... 18
*Elkins v. United States*, 364 U.S. 206 ..... 15
*Ex Parte Garland*, 4 Wall. 333 ..... 10, 12
*Gardner v. Broderick*, 392 U.S. 273 ..... 9, 13
*Garrity v. New Jersey*, 385 U.S. 493 ..... 10, 11
*Gibson v. Florida State Legislative Comm.*, 372 U.S. 539 ..... 18
*Griffin v. California*, 380 U.S. 609 ..... 8
*In re Ruffclo*, 390 U.S. 544 ..... 12, 17
*In re Ungar*, 27 A.D.2d 925, 282 N.Y.S.2d 158 (1st Dept. 1967) ..... 11
*Kaye v. Co-ordinating Committee*, 386 U.S. 17 ..... 8, 9
*Knoll Associates, Inc. v. Federal Trade Commission*, 397 F.2d 530 (C.A. 7, 1968) ..... 15
*Lees v. United States*, 150 U.S. 476 ..... 11, 12
*Malloy v. Hogan*, 378 U.S. 1 ..... 8

*Mapp v. Ohio*, 367 U.S. 643 ..... 10, 14, 15

*Matter of Association of the Bar of the City of N.Y. v. Randel*, 258 N.Y. 216, 52 N.E. 1106 ..... 8

*Matter of Edelman*, 16 A.D.2d 521, 229 N.Y.S.2d 844 ..... 8

*Matter of Kaye*, 24 A.D.2d 345, 266 N.Y.S.2d 69 ..... 8

*Matter of Sultan*, 26 A.D.2d 210, 271 N.Y.S.2d 1000 ..... 8

*Matter of Wysell*, 10 A.D.2d 199, 198 N.Y.S.2d 456 ..... 8

*Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 ..... 11, 12

*Raley v. Ohio*, 360 U.S. 423 ..... 17

*Rochin v. California*, 312 U.S. 165 ..... 17

*Rogers v. Richmond*, 365 U.S. 534 ..... 17

*Schware v. Board of Bar Examiners*, 353 U.S. 232 ..... 18

*See v. City of Seattle*, 387 U.S. 541 ..... 15

*Spevack v. Klein*, 16 N.Y.2d 1048, 213 N.E.2d 457, 385 U.S. 511 ..... 8, 9, 12, 13, 14

*Trop v. Dulles*, 356 U.S. 86 ..... 18

*Ullmann v. United States*, 350 U.S. 422 ..... 11

*Uniformed Sanitation Men v. Commission of Sanitation*, 392 U.S. 280 ..... 9, 13

*United States v. Brown*, 381 U.S. 437 ..... 13

*United States v. Lovett*, 328 U.S. 303 ..... 13

*Wiener v. Weintraub*, 22 N.Y.2d 330, 292 N.Y.S.2d 667 ..... 16

*Willner v. Committee on Character*, 373 U.S. 96 ..... 18

*Zuckerman v. Greason*, 20 N.Y.2d 430, 285 N.Y.S.2d 1 (1967) ..... 10, 11

*Zuckerman v. Greason*, 386 U.S. 15 ..... 9

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

---

No.

---

THOMAS F. GORDON,

*Petitioner,*

v.

THE BROOKLYN BAR ASSOCIATION,

*Respondent.*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK**

---

Petitioner prays that a writ of certiorari issue to review the order of the Appellate Division, Second Department, of the Supreme Court of the State of New York entered on July 1, 1968, suspending petitioner from the practice of law for a period of one year.

## OPINION BELOW

The opinion of the court below is reported at 30 A.D.2d 807, 292 N.Y.S.2d 817.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The order of the Appellate Division was entered on July 1, 1968. A motion for reargument was denied by the Appellate Division on August 21, 1968. Petitioner's motion for leave to appeal was denied and his appeal was dismissed by the Court of Appeals of the State of New York on November 13, 1968. A motion for reargument of the motion for leave to appeal and to amend or vacate the order dismissing the appeal taken as of right was denied by the Court of Appeals on December 11, 1968.

## QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against self-incrimination, as applied to state action through the Fourteenth Amendment, precludes an attorney's failure to provide information to the Grievance Committee of a bar association in its investigation of complaints against him from being made the basis of disciplinary charges against the attorney.

2. Whether the Fifth Amendment privilege against self-incrimination, as applied to state action through the Fourteenth Amendment, precludes adverse factual inferences to be drawn from an attorney's failure to testify in disciplinary proceedings against him.

3. Whether the due process clause of the Fourteenth Amendment is violated by basing charges in a disciplinary proceeding on matters which had previously been considered and dismissed by the grievance committee of the bar association, "an arm of the Appellate Division," and by imposing a sanction destructive of an attorney's practice on the basis of conduct which involved no intentional wrongdoing and resulted in no injury to any client.

## CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment V:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

The United States Constitution, Amendment XIV:

> Section 1 * * * nor shall any state deprive any person of life, liberty or property without due process of law;

## STATEMENT OF CASE

Petitioner was admitted to practice as an attorney and counsellor at law in the State of New York on December 20, 1950. The Brooklyn Bar Association, respondent, instituted a disciplinary proceeding against petitioner in the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, by filing its petition verified November 8, 1967. The issues raised by the petitioner's answer were referred for hearing and report to a Justice of the Supreme Court as a referee. After the Justice filed his report dated May 6, 1968, the Appellate Division on respondent's motion ordered petitioner suspended from the practice of law for a period of one year.

The Bar Association's petition contained 25 numbered allegations relating to petitioner's handling of personal injury claims with respect to which he was retained by four clients. Four paragraphs of the petition contained allegations to the effect that petitioner failed to respond to requests of respondent's Committee on Grievances for information concerning complaints it had received with respect to petitioner. (Pet. pars. 8, 9, 15, 20.) The petition also contained allegations concerning admissions made by petitioner at hearings held on the complaints before the Bar Association's Committee on Grievances. (Pet. pars. 10, 22.) Petitioner admitted these allegations.

At the inception of the hearing before the referee, petitioner raised objections to the charges based on his failure to furnish information to the Committee on Grievances

relying upon his constitutional right to remain silent without penalty under the Fifth Amendment (Transcript of Minutes, pp. 4-6). He also objected on constitutional grounds under the Fifth Amendment to the charges based upon admissions made under compulsion at hearings before the grievance committee (Tr. 6-9).

With respect to two complaints (Ahearn and Paradiso), involving claims for personal injuries, the referee found that petitioner was neglectful in that he permitted the claims to become barred by the statute of limitations and failed to advise the clients of the actual status of the matters by making elusive and untrue answers upon inquiries (Referee's Report, p. 7). He further found, however, that petitioner personally settled these matters with the clients by paying Ahearn $1,000 and Paradiso $2,000 (Report, p. 7). Both of these complaints had been the subject of prior hearings by the grievance committee of the Bar Association and had been previously adjudicated. On June 19, 1962, after having received a letter from Ahearn that he wished to withdraw his complaint since petitioner had "satisfactorily concluded the matter," the Bar Association's Committee on Grievances voted to dismiss the complaint (Pet. pp. 3-4). At its meeting on April 19, 1967, the Bar Association's Committee on Grievances similarly voted to dismiss Paradiso's complaint (Pet. p. 5).

With respect to the third and fourth complaints (Kennedy and Lanzilotta), which involved infants' claims for personal injuries, the referee found that petitioner was neglectful in failing to prosecute the claims diligently and in failing properly to advise the clients with respect to the status of their claims (Report, p. 8). No loss was suffered in either case, however. In the *Kennedy* matter, petitioner, who was requested by the client to continue as his attorney, eventually filed a complaint and an offer of settlement has been received (Report, p. 8).[1] In the *Lanzilotta* matter, the

---

[1] This claim has since been satisfactorily settled.

summons and complaint were served within less than a year after the accident occurred. The client moved to Florida in the year in which the complaint was filed and the referee found that the client's failure to make inquiry for substantial periods of time contributed in some measure to petitioner's neglect in the prosecution of the claim (Report, p. 8). The litigation, however, remained alive and another attorney has been substituted for its further prosecution.

The referee's report to the Appellate Division, after summarizing the pleadings and reviewing the testimony, immediately before the statement of his findings, included the following paragraph:

"Respondent [petitioner] did not testify at the hearing."

The Appellate Division confirmed the report of the referee with respect to the four charges, but disaffirmed the further finding in connection with the fourth charge that the client's moving to Florida and failing to make inquiry for substantial periods of time contributed to the delay in the prosecution of the claim. The decision of the Appellate Division dated July 1, 1968, contained the statement with respect to the findings of the referee that "these findings were established by the admissions in respondent's [petitioner's] answer to the petition". The decision of the Appellate Division thus relied in part upon petitioner's admissions with respect to the allegations in the petition that he failed to furnish information to the Committee on Grievances. By its order of July 1, 1968, the Appellate Division ordered that petitioner be suspended from the practice of law for a period of one year, commencing July 20, 1968.

In his motion, by order to show cause signed July 16, 1968, for leave to reargue confirmation of the referee's report and to vacate the Appellate Division's order of July 1, 1968, which was denied on August 21, 1968, and supporting brief petitioner again raised the issue that inclusion in the charges of his failure to respond to requests of the bar association's Committee on Grievances violated his constitutional right to remain silent. The privilege was asserted

with respect to both the allegations based upon his failure to supply information to the Committee on Grievances and to the coerced admissions made before the Committee. Petitioner also argued in his brief inclusion in the charges against him of the two complaints which had previously been dismissed by the Committee on Grievances was a denial of due process of law.

Petitioner's motion for leave to appeal to the Court of Appeals raised the question that his constitutional rights under the Fifth and Fourteenth Amendment of the Constitution of the United States were violated, that the penalty imposed was excessive and unwarranted under all of the facts and circumstances of the case and vague and indefinite and in violation of due process of law. In his brief, petitioner argued that he had been penalized in violation of his constitutional right to remain silent, that revival of the two complaints previously dismissed was a denial of due process, that the penalty imposed "continuing until the further order of the court" was violative of due process as vague and uncertain, and that the punishment inflicted was out of proportion to the misconduct charged (Brief, pp. 7, 15-17). On November 13, 1968, the Court of Appeals denied petitioner's motion for leave to appeal and dismissed the appeals taken as of right upon the ground that no substantial constitutional question was presented. Petitioner's motion for reargument of the denial of his motion for leave to appeal and the dismissal of his appeal or, in the alternative, for amendment of the remittitur raised the question of a denial of due process under the Fifth and Fourteenth Amendments on the grounds, among others, that petitioner was accused of misconduct for his failure to respond to inquiries of the Committee on Grievances, that two of the charges had been previously adjudicated, and that the penalty imposed was vague, and indefinite, and out of proportion to the seriousness of the misconduct charge. The Court of Appeals denied this motion in all respects on December 11, 1968. Both courts below failed to pass upon the constitutional issues raised by petitioner.

The suspension order has been stayed both in the Appellate Division and during the pendency of the proceedings in the Court of Appeals. After final denial of leave to appeal and dismissal of the appeal in the Court of Appeals, respondent requested the Appellate Division by motion to fix a new date for the suspension to commence. Respondent's motion to fix a new date has been denied by the Appellate Division and a new date has not yet been fixed. Suspended attorneys are required to notify all clients and adversary attorneys by registered or certified mail of the fact of their suspension and inability to act as an attorney.

## REASONS FOR GRANTING THE WRIT

Petitioner submits that the proceedings below violated rights guaranteed by the Fourth, Fifth and Fourteenth Amendments to the Federal Constitution in three respects: (1) The attachment of adverse consequences in the disciplinary proceeding to petitioner's decision to remain silent violates the Fifth Amendment privilege against self-incrimination. (2) The use in the disciplinary proceeding of admissions made by petitioner under the threat of disbarment constitutes a violation of the Fourth and Fifth Amendments. (3) Predicating disciplinary action on charges previously dismissed by the Committee on Grievances of the bar association and imposing a punishment virtually destructive of an attorney's practice constitutes a denial of due process of law guaranteed by the Fourteenth Amendment.

1. It has been shown that the Bar Association's petition which initiated the instant disciplinary proceeding contained numerous allegations of petitioner's failure to provide information requested in connection with complaints received by its Committee on Grievances. Petitioner's failure to deny these allegations and the Appellate Division's reliance in its decision upon petitioner's admissions indicate that they constituted part of the case made against petitioner in the disciplinary proceeding. We have also adverted to the referee's emphatic notation in his report to the Appellate

Division of petitioner's failure to testify at the hearing. The Appellate Division's decision nowhere suggests that it gave no weight to this factor. The decisions of the New York courts make clear that they regard with disfavor an attorney's failure to cooperate by furnishing inculpatory information to an investigating committee (*Cohen v. Hurley*, 366 U.S. 117; *Spevak v. Klein*, 16 N.Y.2d 1048, 213 N.E.2d 457; *Matter of Sultan*, 26 A.D.2d 210, 271 N.Y.S.2d 1000; *Matter of Edelman*, 16 A.D.2d 521, 229 N.Y.S.2d 844) and will draw adverse inferences from his failure to testify in his own disciplinary proceeding (*Matter of Kaye*, 24 A.D.2d 345, 266 N.Y.S.2d 69; *Matter of Wysell*, 10 A.D.2d 199, 202, 198 N.Y.S.2d 456; *Matter of Association of the Bar of the City of N.Y. v. Randel*, 258 N.Y. 216, 219, 221, 52 N.E. 1106).

The attachment of adverse consequences to petitioner's failure to provide incriminating information to the Committee on Grievances and his failure to testify before the referee imposed an impermissible penalty on the exercise of the privilege against self-incrimination. In *Malloy v. Hogan*, 378 U.S. 1, 8, the Court made clear that application of the Fifth Amendment standards to the Fourteenth Amendment precluded the States from penalizing the exercise of "the right of a person to remain silent." Thus, the Court held in *Griffin v. California*, 380 U.S. 609, 614, that adverse comment by a court or prosecutor upon the refusal to testify is repugnant to the Fifth Amendment, since "[i]t is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Basing charges in a disciplinary proceeding on failure to supply information and drawing an adverse conclusion from petitioner's failure to testify are patently greater penalties than the adverse comments to the jury condemned in *Griffin v. California*.

The application of these principles in disciplinary proceedings involving attorneys was made clear by this Court's decisions in *Spevack v. Klein*, 385 U.S. 511; *Kaye v. Co-*

*ordinating Committee*, 386 U.S. 17, and *Zuckerman v. Greason*, 386 U.S. 15. In *Spevack v. Klein*, which expressly overruled *Cohen v. Hurley*, 366 U.S. 117, the Court expressly held that the privilege against self-incrimination was available to attorneys and that disbarment was a punishment not to be imposed upon an attorney for invoking the privilege and refusing to testify in an investigation of the attorney's conduct. *Kaye v. Co-ordinating Committee*, involved, among other things, the penalty of an adverse presumption against the attorney in a disciplinary proceeding because of his failure to testify. The Court wrote no opinion but vacated the disbarment order and remanded the case for reconsideration in light of *Spevack v. Klein*. It appears, therefore, that petitioner's privilege against self-incrimination under the Fifth and Fourteenth Amendments was infringed when his failure to provide information and to testify had adverse effects in the disciplinary proceeding.

2. The use in the disciplinary proceeding of admissions made by petitioner to the Committee on Grievances under the implied threat of disbarment (*Cohen v. Hurley*, 366 U.S. 177) also constituted a violation of his Fifth Amendment privilege as well as the guarantee against unreasonable searches and seizures of the Fourth Amendment. Petitioner's admissions before the Committee on Grievances were alleged in the petition filed by the bar association in the disciplinary proceeding and not denied by petitioner. They were relied upon by the referee and the Appellate Division in the adverse findings made with respect to the petitioner.

A. *Spevack v. Klein*, 385 U.S. 511, established that an attorney may not be disbarred for his refusal in reliance on the privilege against self-incrimination to furnish records and information relating to his law practice. See also *Uniformed Sanitation Men v. Commission of Sanitation*, 392 U.S. 280; *Gardner v. Broderick*, 392 U.S. 273. Petitioner, under threat of disbarment for failure to do so (*Cohen v. Hurley*, 366 U.S. 177), complied with a request by the Committee on Grievances for information. The evidence

compelled by threat of disbarment was used in the subsequent disciplinary proceedings against him which resulted in the suspension order of July 1, 1968. Clearly, this compelled testimony could not have been used against petitioner in a criminal prosecution (*Garrity v. New Jersey*, 385 U.S. 493) or in a proceeding for forfeiture of his property. *Boyd v. United States*, 116 U.S. 616. The New York Court of Appeals has recently held that attorneys "had no privilege against making disclosures usable only in a disciplinary proceeding. The Constitutional privilege applies only in the case of evidence which might be used against them in a criminal case under the language of the Fifth Amendment." *Zuckerman v. Greason*, 20 N.Y.2d 430, 438, 285 N.Y.S.2d 1, 6 (1967). Obviously, this holding determined the Appellate Division's and the Court of Appeals' rejection of petitioner's claim of a violation of his rights under the Fifth and Fourteenth Amendments.

The result in the present case assumes that evidence coerced by threat of disbarment may be used against an attorney in a disciplinary proceeding. But whether evidence so coerced may thus be used is a question of substance under the Fifth Amendment which has not heretofore been determined by this Court and deserves the Court's consideration because the decision below appears inconsistent with the decisions of this Court that the forfeiture of property is a criminal case under the Fifth Amendment (*Boyd v. United Stated, supra*) and that denial of the right to practice law is punishment under the bill of attainder prohibitions of the Constitution. *Ex Parte Garland*, 4 Wall. 333, 377. Also involved is the closely related question whether the coercive nature of the Committee on Grievances' demand (*Boyd v. United States, supra*) constituted an unreasonable search under the Fourth Amendment which brough into play the exclusionary rule held applicable to the State in *Mapp v. Ohio*, 367 U.S. 643.

Petitioner's claim of a violation of the privilege against self-incrimination rests on the contention that the suspension

of an attorney from the practice of law is within the protection of the privilege because it is the equivalent of a criminal penalty and that the use in the disciplinary proceeding of incriminating evidence compelled by threat of disbarment constituted an invasion of the privilege. The holding that the use of coerced testimony did not violate petitioner's constitutional rights is presumably based upon the rationale that a disciplinary proceeding is not a "criminal case" within the meaning of the privilege against self-incrimination. *Zukerman v. Greason*, 20 N.Y.2d 430; 285 N.Y.S.2d 1 (1967); *In re Ungar*, 27 A.D.2d 925, 282 N.Y.S.2d 158 (1st Dept., 1967).

If suspension from the bar is a criminal penalty, however, the Fifth Amendment precludes the use of coerced testimony in the disciplinary proceeding. The compulsion of incriminating testimony generates an immunity from sanctions which are "criminal in nature" (*Ullmann v. United States*, 350 U.S. 422, 431) whether or not the immunity is contemplated when the testimony is compelled. *Garrity v. New Jersey*, 385 U.S. 493. Consequently, compelling petitioner to testify under threat of disbarment barred the use of this testimony in any proceeding which might result in the imposition of a penalty of a criminal nature. The use of compelled testimony in the present case, therefore, squarely poses the question whether a disciplinary proceeding is a "criminal case" within the meaning of the Fifth Amendment's prohibition against compelled, self-incriminating testimony.

There is formidable authority in the decisions of this Court for the view that, for self-incrimination purposes, a disciplinary proceeding is criminal in nature. *Boyd v. United States*, 116 U.S. 616; *Lees v. United States*, 150 U.S. 476; cf. *Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 701. Certainly, the loss of one's right to practice his profession, whether temporary or permanent, is no less a criminal penalty than the forfeiture of property involved in the *Boyd* case. The continued vitality of the *Boyd* case was

underscored by the reaffirmation in *Spevack v. Klein* "of the broad protection given the privilege" in *Boyd v. United States, supra.* In *Boyd* "compulsory production of books and papers of the owner of goods sought to be forfeited was held to be compelling him to be a witness against himself" (385 U.S. at 515). The *Lees* and *Plymouth Sedan* cases also involved property forfeitures. The dissenting opinions in *Cohen v. Hurley*, 366 U.S. 117, overruled in *Spevack v. Klein*, 385 U.S. 511, expounded the views that the effects of disbarment were so severe as to entitle a lawyer to "the full benefit of the 'law of the land' " (366 U.S. at 147) and that "taking away a man's right to practice law is imposing a penalty as severe as a criminal sanction" (366 U.S. at 153-154). Although disbarment has a more severe effect on the attorney involved than suspension, suspension is more clearly imposed as punishment. The purpose of disbarment may be to protect the public from an unfit practitioner. Suspension for a one-year period, however, acknowledges that the attorney is not unfit to practice law by recognizing him as a suitable practitioner after expiration of the suspension period. The suspension is obviously punishment for misconduct.

Denial of the right to engage in the practice of law or in other occupations has been held similar to a criminal penalty for the purpose of other constitutional provisions. An attorney has been held "entitled to procedural due process, which includes fair notice of the charge" in disciplinary proceedings because they "are proceedings of a quasi-criminal nature" and disqualification from practice "is a punishment or penalty imposed on the lawyer." *In Re Ruffalo*, 390 U.S. 544. Disqualification from the practice of law, as well as the pursuit of other vacations, has been regarded as punishment for the purposes of the Constitution's bill of attainder and ex post facto prohibitions. *Ex Parte Garland*, 4 Wall. 333, 377 (Legislative denial of an attorney's right to practice "for past conduct can be regarded in no other light than as punishment for such conduct"); *Cummings v. Missouri*, 4 Wall. 277, 327 ("This deprivation [of right to

pursue regular avocations] is punishment"); *United States v. Lovett*, 328 U.S. 303, 316 ("Permanent proscription from any opportunity to serve the Government is punishment"); *United States v. Brown*, 381 U.S. 437 (Disqualification from holding union office held punishment). Since disqualification from practicing law has been regarded as a criminal penalty for the purpose of other constitutional safeguards, it should similarly be regarded as criminal punishment for purposes of the privilege against self-incrimination. The question whether disciplinary action against attorneys is within the protection of the privilege, therefore, warrants review by this Court.

The importance of determining whether a disciplinary proceeding is a criminal case for purposes of the privilege is accentuated by the interpretation by some members of the Court of the recent decisions in *Uniformed Sanitation Men v. Commissioner of Sanitation*, 392 U.S. 280, and *Gardner v. Broderick*, 392 U.S. 273, that attorneys may be compelled, absent the possibility of criminal prosecution, to provide information that may lead to their disqualification from practice. The opinion of the Court by Mr. Justice Fortas in the *Gardner* case (p. 278) acknowledged that if "a policeman had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. New Jersey*, *supra*, the privilege against self-incrimination would not have been a bar to his dismissal." Mr. Justice Harlan apparently derives from this the conclusion that an attorney, similarly, may be disbarred, notwithstanding the decision in *Spevack v. Klein*, *supra*, for refusing to answer questions concerning the practice of his profession. In a concurring opinion, joined by Mr. Justice Stewart, he finds in the *Gardner* and *Uniformed Sanitation* cases "a procedural formula whereby" lawyers may be "disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices" (392 U.S. at 285).

Obviously, if lawyers may be punished for refusing to disclose information that may lead to disciplinary action, such punishment is not within the protection of the privilege. Mr. Justice Fortas, however, expressly differentiated the situation of a public official from that of a lawyer, thereby suggesting that, even absent the possibility of criminal prosecution, the lawyer may not be disciplined for refusing to provide information concerning his law practice presumably because disciplinary proceedings are within the scope of the privilege. The desirability of a dispositive decision of this Court to resolve any doubt on the important constitutional question whether the privilege applies to the penalty of disqualification from the practice of law seems apparent.

B. The compulsory production of petitioner's testimony under an unconstitutional threat of disbarment constituted an illegal search and seizure under the Fourth Amendment.[2] *Spevack v. Klein, supra,* decided that a lawyer cannot be disbarred because of his refusal to testify at a disciplinary investigation in reliance on the privilege against self-incrimination. Petitioner, however, under threat of disbarment in violation of his constitutional rights, was compelled to forego the privilege and supply inculpatory information. The fruits of this unconstitutional compulsion were utilized in the proceeding which led to his suspension. *Boyd v. United States, supra,* held that "a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment" (116 U.S. at 622). Coerced production for disciplinary purposes would appear similarly to be within its scope.

---

[2]Petitioner did not raise a Fourth Amendment question in the proceedings below. Because of the close connection between the concepts embodied in the Fourth and Fifth Amendments (*Boyd v. United States, supra; Mapp v. Ohio, supra*), however, the court may wish to consider petitioner's constitutional claim in terms of the Fourth, as well as the Fifth, Amendment.

The exclusionary rule with respect to evidence obtained by an unreasonable search was held applicable to state proceedings in *Mapp v. Ohio*, 367 U.S. 643. The Fourth Amendment has been held applicable to administrative investigations (see, e.g. *See v. City of Seattle*, 387 U.S. 541), and the policy of the exclusionary rule to discourage violation of the constitutional protection would seem to preclude the State's use of evidence obtained in violation of the Fourth Amendment in a civil or quasi-criminal, as well as a criminal, proceeding. See *Mapp v. Ohio, supra; Elkins v. United States*, 364 U.S. 206. Evidence tainted by an unreasonable search has been held by a Court of Appeals inadmissible in an administrative proceeding which resulted in a cease and desist order. *Knoll Associates, Inc. v. Federal Trade Commission*, 397 F. 2d 530 (C.A. 7, 1968). The same policy should preclude use in disciplinary proceedings of the product of the unconstitutional invasion to the detriment of the person whose constitutional privilege was violated. The present case thus presents a question of important constitutional dimensions under the Fourth, as well as the Fifth Amendment.

3. Whether or not the self-incrimination and unlawful search and seizure prohibitions of the Fourth and Fifth Amendments have been violated, the proceedings which culminated in the suspension order departed so radically from concepts of fundamental fairness as to constitute a violation of the more generalized due process clause of the Fourteenth Amendment.

The one-year suspension imposed upon petitioner was based upon findings that he had been neglectful in handling four matters in which he had been retained and that he had been less than frank in disclosing the status of some of these matters upon inquiry. Two of the matters have been the subject of earlier consideration by the Committee on Grievances, one in 1962 and the other in 1966. They had been satisfactorily settled by petitioner with the clients by payment of the value of their claim and had been dismissed by

the Committee on Grievances. The remaining two matters resulted in no pecuniary loss to the clients. In one, after being apprised of all the facts, the client requested petitioner to continue as his attorney in the case which has now been settled to the satisfaction of the client. In the other, a new attorney has been substituted.

With respect to the dismissed charges, it is inherently inequitable to base new charges on matters which have been already heard and adjudicated, particularly since the prior adjudication by the Committee on Grievances is regarded in New York as the conclusion of a "judicial proceeding". In *Wiener v. Weintraub*, 22 N.Y. 2d 330, 292 N.Y. Supp. 2d 667 (1968), the New York Court of Appeals held:

> Petitions or complaints charging professional misconduct of an attorney which, in the past, were presented to the General Term of the Supreme Court (see *Youmans v. Smith*, 153 N.Y. 214, 215, *supra*) are now usually filed with the Grievance Committee of a Bar association. * * * And it has been observed a proceeding before such a committee constitutes a "judicial proceeding" (*Doe v. Rosenberry*, 255 F.2d 118, 120). *In the investigation of such complaints and in the conduct of such proceeding then the Bar association's Grievance Committee acts as a quasi-judicial body and as such, is an arm of the Appellate Division. Quite clearly, the filing of the complaint in the present case initiated a judicial proceeding.* (Emphasis supplied.)

Elementary fairness, resting on double jeopardy concepts embodied in our fundamental law, would seem to preclude matters which have already been adjudicated by "an arm of the Appellate Division" from being the subject of subsequent disciplinary proceedings by the Appellate Division.

In any event, whether the severity of the one-year suspension be evaluated as a punishment for the four complaints or the two complaints not previously adjudicated, it is unnecessarily harsh and, for that reason, not reasonably related to an appropriate state interest in the regula-

tion of the practice of law. This conclusion is urged in light of the fact there was no deliberate wrongdoing and no one suffered any loss. The order of suspension requires petitioner to notify promptly by registered or certified mail all clients being represented in pending matters and attorneys for adverse parties of his suspension and consequent inability to act as an attorney after the effective date of the suspension order. Furthermore, reinstatement is not automatic after the one year suspension but continues "until the further order of this Court, with leave to apply for reinstatement after the expiration of said period of one year". It is thus clear that the suspension itself will extend for considerably more than a year. Moreover, it should be recognized, as a practical matter, that the suspension of an attorney engaged in a negligence practice, in which because of court calendar delays it takes years to develop the necessary backlog of cases to provide current income, is virtually destructive of the attorney's practice.

This severe punishment in the circumstances of this case constitutes a denial of due process. Although all-encompassing standards of due process under the Fourteenth Amendment have not been precisely defined, conduct which is unduly offensive to the sense of fairness inherent in our traditional concepts of liberty and respect for individual rights or which shocks the common understanding of decency and fair play does not satisfy its requirements. The standards of due process in a disciplinary proceeding approach those applied in cases of a criminal nature. *In re Ruffalo, supra.* Measured against these standards the instant disciplinary proceeding violated the fundamental fairness standard of the due process clause of the Fourteenth Amendment. Cf. *Rochin v. California,* 312 U.S. 165; *Rogers v. Richmond,* 365 U.S. 534; *Raley v. Ohio,* 360 U.S. 423.

The extreme penalty imposed upon petitioner is not reasonably related to the State's proper interest in regulating membership in the bar. The State cannot deny a person

membership in the Bar for reasons that do not have a rational connection to their fitness or capacity as practitioners. *Schware v. Board of Bar Examiners,* 353 U.S. 232. "There is no showing of 'overriding and compelling state interest' (*Gibson v. Florida State Legislative Comm.*, 372 U.S. 539, 546) that would warrant intrusion" (*DeGregory v. New Hampshire Atty. Gen.*, 383 U.S. 825, 829) into petitioner's constitutionally protected right to remain a member of the bar. Cf. *Schware v. Board of Bar Examiners, supra; Willner v. Committee on Character,* 373 U.S. 96. The "requisite rational relation" between the severe punishment of destruction of petitioner's law practice and the proper objects of regulation of the practice of law is entirely absent. Cf. concurring opinion in *Trop v. Dulles,* 356 U.S. 86, 114.

This Court has taken notice on numerous occasions of the extreme severity of the punishment of disqualification from practice and of the humiliation and disgrace which accompany it. "A removal from the Bar should, therefore, never be decreed where any punishment less servere * * * would accomplish the end desired." *Bradley v. Fisher,* 13 Wall. at 355. The harsh sanction against petitioner weighs so disproportionately against the charges sustained as to constitute a violation of substantive due process.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MORTON LIFTIN
1819 H Street, N.W.
Washington, D.C. 20006
*Attorney for Petitioner*

# APPENDIX

## OPINION OF APPELLATE DIVISION, JULY 1, 1968

In this proceeding to discipline an attorney for professional misconduct, petitioner moves (1) to confirm in part and to disaffirm in part the report of the Justice of the Supreme Court to whom this court referred the issues for hearing and report and (2) for further action with respect to respondent as contemplated by law. Respondent was admitted to the Bar by this court on December 20, 1950.

The proceeding involves four charges against respondent, set forth in the petition, each based on a complaint by or on behalf of a separate client with respect to respondent's conduct in the handling of the client's claim for injuries sustained. As to the first two charges the findings in the report are that respondent was neglectful in that he failed to prosecute the clients' claims, permitting the claims to become barred by the Statute of Limitations; failed to advise the clients of the true status of the claims; and made general, elusive and untrue responses to the clients' inquiries; but personally made payment to the clients in settlement.

The injured claimant in the third charge was an infant and the findings are that respondent was neglectful in that he failed to respond to repeated inquiries by the child's father (who had retained respondent) as to the status of the claim; and failed to prosecute the claim diligently—the claim was not barred by the Statute of Limitations only because of the infancy of the claimant and an action upon the claim is now pending.

As to the fourth charge, it was found that, although respondent commenced an action upon the claim in January, 1954, he failed to prosecute the action thereafter for about 14 years; that respondent failed to advise this client of the true status of the matter; and that he made general, elusive and untrue responses to the client's inquiries in 1955, 1957, 1965 and 1967.

In our opinion, these findings were established by the admissions in respondent's answer to the petition and by the proof at the hearing; we therefore confirm the report as to these findings, as requested in petitioner's motion.

It is as to a further finding in connection with the fourth charge that petitioner asks disaffirmance. That finding is that the "failure" of the client (who had moved to Florida in 1954) "to make inquiry of respondent for substantial periods of time contributed in some measure to respondent's neglect in the prosecution of this claim." We are in agreement with petitioner that this finding was not warranted by the record and therefore we disaffirm the report as to it.

Petitioner's motion is granted in all respects. Respondent should be, and he hereby is, suspended from the practice of law for a period of one year, commencing July 20, 1968.

---

**APPELLATE DIVISION'S ORDER OF SUSPENSION, JULY 1, 1968**

A disciplinary proceeding having been instituted in this court upon the petition of The Brooklyn Bar Association in respect to Thomas F. Gordon, an attorney and counselor at law, admitted to practice by this court on December 20, 1950; the petition praying that the respondent Thomas F. Gordon be disciplined for professional misconduct upon the charges therein set forth; the said proceeding having come on to be heard by a notice of motion, dated November 10, 1967; the respondent having filed an answer; this court by an order dated December 18, 1967 having referred the issues raised by the pleadings to the Hon. Theodore D. Ostrow; thereafter by amended order of reference dated January 29, 1968, the Hon. Vincent D. Damiani, Justice of the Supreme Court, having been substituted for the Hon. Theodore D. Ostrow (deceased) to hear and to report, with his findings upon each of the issues; thereafter the said Justice having held hearings and having filed his report dated May

6, 1968, together with the testimony and exhibits; and petitioner by notice of motion, dated May 21, 1968, having moved (1) to confirm in part and to disaffirm in part the report of the Justice and (2) for further action with respect to respondent as contemplated by law;

NOW, upon the said petition, verified November 8, 1967, the answer verified December 5, 1967; the typewritten transcript of the stenographic minutes of the hearings; the exhibits; the said report dated May 6, 1968; and the said notice of motion of petitioner and affirmation of Herbert H. Hefler in support of said motion; the affidavit of respondent in opposition thereto; and upon all the papers filed herein, and upon the opinion and decision slip of the court herein, heretofore filed and made a part hereof; and Herbert H. Hefler, Esq., appearing of counsel for petitioner and Edward J. McCann, Esq., appearing of counsel for respondent; and due deliberation having been had thereon; it is:

ORDERED that petitioner's motion to confirm in part and disaffirm in part the report of the Justice is hereby granted; and it is further

ORDERED that the findings of fact made by the Justice as contained in his report are hereby confirmed, except that with respect to the fourth charge the finding to the effect that the client's failure to make inquiry of the respondent contributed to the respondent's neglect, is disaffirmed as set forth in the opinion and decision slip of the court herein; and it is further

ORDERED that respondent THOMAS F. GORDON, is hereby suspended from the practice of the law for a period on one year, commencing July 20, 1968, and continuing until the further order of this court, with leave to apply for reinstatement after the expiration of said period of one year, upon furnishing satisfactory proof: (a) that during said period he has actually refrained from practicing or attempting to practice as an attorney and counselor at law; (b) that he has fully complied with this order and with the

terms and provisions of the written instructions governing the conduct and duties of suspended attorneys, a copy of such instructions being annexed hereto and made a part hereof; and (c) that he has otherwise properly conducted himself; and it is further

ORDERED, pursuant to statute (Judiciary Law, § 90), that the said respondent THOMAS F. GORDON, during the period of such suspension and until the further order of this court, be and he hereby is commanded to desist and refrain: (1) from practicing law in any form, either as principal or agent, clerk or employee of another; (2) from appearing as an attorney or counselor at law before any court, judge, justice, board, commission or other public authority; (3) from giving to another an opinion as to the law or its application, or any advice in relation thereto; and (4) from holding himself out in any way as an attorney or counselor at law.

---

**MINUTES OF HEARING BEFORE REFEREE, APRIL 5, 1968**

* * *

Now, on that score, I say that there was a violation of the constitutional right of this respondent to remain silent. As a result of his compliance with the decisional law of this state as existed at that time, he did testify and flowing from that testimony we have this particular complaint, because prior to that time, while it does appear that there were two complaints, they were adjusted as matters of a breach of contract.

* * *

Now, aside from my objections as offered as to Paragraphs 8, 9, 15 and 20 as being violative of the constitutional rights of the respondent, I respectfully ask that your Honor in reporting to the Appellate Division give a judicial finding on the violation of the constitutional rights of the respondent.

As a matter of fact, I think your Honor is very familiar with the Garrity against New Jersey case decided by the Supreme Court within the last year and a half or so, wherein the Court said that the provisions of the Constitution of the United States under the Fifth and Fourteenth amendments as to teachers and lawyers cannot be watered down.

I say that under our own Constitution this respondent, that is under the provisions of Article 1 Section 6 of our own Constitution, and under the Fifth Amendment to the Constitution of the United States, this respondent was, by the action of the bar association and its committee on grievances, deprived of his right to due process of law within this state.

---

**AFFIDAVIT IN SUPPORT OF MOTION FOR REARGUMENT, FILED IN APPELLATE DIVISION ON JULY 16, 1968**

* * *

That as part of the petition by paragraphs 8, 9, 15 and 20, the petitioner makes sole reference to the alleged failure of your deponent to respond to requests of the petitioner's Committee on Grievances.

While your deponent's answer did admit the factual statements made in paragraphs 8, 9, 15 and 20 as well as others of the petition, it would appear from the opinion of this Court dated July 1, 1968, that such admissions do redound to the detriment of your deponent, and accordingly did violate his constitutional rights and privileges.

Upon the opening of the hearing before Mr. Justice Damiani on April 5, 1968, your deponent's attorney immediately objected to the proceeding upon the ground that the inclusion of said paragraphs 8, 9, 15 and 20 did violate a fundamental constitutional right of deponent to remain silent (SM 2-9). The reply of counsel for the petitioner to deponent's argument asserted as a matter of law that an attorney must testify. This contention is without merit.

Mr. Justice Damiani, in his report filed in this Court, dated May 8, 1968, on page 4, under the heading "Hearing", referring to the aforementioned issue says, "The undersigned has not passed upon any of these issues in view of the fact that the Order of Reference herein is only to hear and report."

This court in its decision dated July 1, 1968, stated:

"In our opinion, these findings were established by the admissions in Respondent's answer to the petition."

It is clear from the opinion that the judgment of this Court was based upon the admissions in deponent's answer, including paragraphs 8, 9, 15 and 20 of the petition, resulting in deponent being penalized and punished in violation of the fundamental constitutional right and privilege of due process of law.

The issue raised upon the opening of the hearing was as a matter of law referred for judicial determination to this Court (SM 2-6). This Court failed to answer this vital constitutional issue involving the due process afforded to members of the Bar, resulting in an Order of suspension herein being founded upon a violation of a constitutional right.

---

**COURT OF APPEALS' ORDER TO SHOW CAUSE ON MOTION FOR LEAVE TO APPEAL, SEPTEMBER 10, 1968**

ORDERED, that the Petitioner show cause before this Court at a session to be held at the Courthouse thereof, in the Court of Appeals Hall, Eagle and Pine Streets, Albany, New York, on the 24th day of September 1968, at 2:00 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, why an ORDER should not be made herein:

(A) Granting leave to the Respondent, THOMAS F. GORDON, to appeal to the Court of Appeals from the said Order of suspension of the Appellate Division, on the grounds:

(1) That the Constitutional rights of the Respondent under the FIFTH and FOURTEENTH Amendments to the Constitution of the United States of America were violated;

(2) That the penalty imposed was excessive and unwarranted under all the facts and circumstances of the case.

(3) That the penalty is vague and indefinite and is violation of due Process of Law;